

## **PART 517—FREEDOM OF INFORMATION ACT PROCEDURES**

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The authority citation continues to read as follows:

**Authority:** 5 U.S.C. 552, as amended.

### **§ 517.1 General provisions.**

This part contains the regulations the National Indian Gaming Commission (Commission) follows in implementing the Freedom of Information Act (FOIA) (5 U.S.C. 552) as amended. These regulations provide procedures by which you may obtain access to records compiled, created, and maintained by the Commission, along with procedures the Commission must follow in response to such requests for records. These regulations should be read together with the FOIA, which provides additional information about access to records maintained by the Commission.

### **§ 517.2 Public reading room.**

Records that are required to be maintained by the Commission shall be available for public inspection and copying at 1441 L Street, NW., Suite 9100 Washington, DC. Reading room records created on or after November 1, 1996, shall be made available electronically via the Web site.

### **§ 517.3 Definitions.**

(a) *Commercial use requester* means a requester seeking information for a use or purpose that furthers the commercial, trade, or profit interests of himself or the person on whose behalf the request is made, which can include furthering those interests through litigation. In determining whether a request properly belongs in this category, the FOIA Officer shall determine the use to which the requester will put the documents requested. Where the FOIA Officer has reasonable cause to doubt the use to which the requester will put the records sought, or where that use is not clear from the request itself, the FOIA Officer shall contact the requester for additional clarification before assigning the request to a specific category.

(b) *Confidential commercial information* means records provided to the government by a submitter that arguably contains material exempt from disclosure under Exemption 4 of the FOIA,

because disclosure could reasonably be expected to cause substantial competitive harm.

(c) *Direct costs* mean those expenditures by the Commission actually incurred in searching for and duplicating records in response to the FOIA request. Direct costs include the salary of the employee or employees performing the work (the basic rate of pay for the employee plus a percentage of that rate to cover benefits) and the cost of operating duplicating machinery. Direct costs do not include overhead expenses, such as the cost of space, heating, or lighting of the facility in which the records are stored.

(d) *Duplication* refers to the process of making a copy of a document necessary to fulfill the FOIA request. Such copies can take the form of, among other things, paper copy, microfilm, audio-visual materials, or machine readable documentation. The copies provided shall be in a form that is reasonably usable by the requester.

(e) *Educational institution* refers to a preschool, a public or private elementary or secondary school, an institute of undergraduate higher education, an institute of graduate higher education, an institute of professional education, or an institute of vocational education which operates a program of scholarly research. To qualify for this category, the requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought to further scholarly research.

(f) *Freedom of Information Act Officer* means the person designated by the Chairman to administer the FOIA.

(g) *Non-commercial scientific institution* refers to an institution that is not operated on a "commercial" basis as that term is used in paragraph (a) of this section, and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. To qualify for this category, the requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought to further scholarly research.

(h) *Record* means all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by the Commission under Federal law or in connection with the transaction of public business and preserved or appropriate for preservation by the Commission or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them. Library and museum material made or acquired and preserved solely for reference or exhibition purposes, extra copies of documents preserved only for convenience of reference, and stocks of publications and of processed documents are not included.

(i) *Representative of the news media* means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. For a "freelance journalist" to be regarded as working for a news organization, the requester must demonstrate a solid basis for expecting publication through that organization, such as a publication contract. Absent such showing, the requester may provide documentation establishing the requester's past publication record. To qualify for this category, the requester must not be seeking the requested records for a commercial use. However, a request for records supporting a news-dissemination function shall not be considered to be for a commercial use.

(j) *Requester* means any person, including an individual, Indian tribe, partnership, corporation, association, or public or private organization other than a Federal agency, that requests access to records in the possession of the Commission.

(k) *Review* means the process of examining a record in response to a FOIA request to determine

if any portion of that record may be withheld under one or more of the FOIA Exemptions. It also includes processing any record for disclosure, for example, redacting information that is exempt from disclosure under the FOIA. Review time includes time spent considering any formal objection to disclosure made by a business submitter under Sec. 517.7 (c). Review time does not include time spent resolving general legal or policy issues regarding the use of FOIA Exemptions.

(l) *Search* refers to the time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within a document and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. The FOIA Officer shall ensure that searches are conducted in the most efficient and least expensive manner reasonably possible.

(m) *Submitter* means any person or entity who provides information directly or indirectly to the Commission. The term includes, but is not limited to, corporations, Indian tribal governments, state governments and foreign governments.

(n) *Working day* means a Federal workday that does not include Saturdays, Sundays, or Federal holidays.

#### **§ 517.4 Requirements for making requests.**

(a) *How to make a FOIA request.* Requests for records made pursuant to the FOIA must be in writing. Requests should be sent to the National Indian Gaming Commission, Attn: FOIA Officer, 1441 L Street, NW., Suite 9100, Washington, DC 20005. Requests may be mailed, dropped off in person, or faxed to (202) 632-7066 (not a toll free number). If the requester is making a request for records about himself/ herself, the requester should see 25 CFR 515.3 for additional information. If the requester is making a request for records about another individual, the requester must provide either a written authorization signed by that individual authorizing disclosure of the records to the requester or provide proof that the individual is deceased (for example, a copy of the death certificate or a copy of the obituary).

(b) *Description of records sought.* Requests for records shall describe the records requested with as much specificity as possible to enable Commission employees to locate the information requested with a reasonable amount of effort.

(c) *Agreement to pay fees.* Requests shall also include a statement indicating the maximum amount of fees the requester is willing to pay to obtain the requested information, or a request for a waiver or reduction of fees. If the requester is requesting a waiver or reduction of fees the requester must include justification for such waiver or reduction (see Sec. 517.9 (c) for more information). If the request for a fee waiver is denied, the requester will be notified of this decision and advised that fees associated with the processing of the request will be assessed. The requester must send an acknowledgment to the FOIA Officer indicating his/her willingness to pay the fees. Absent such acknowledgment within the specified time frame, the request will be considered incomplete, no further work shall be done, and the request will be administratively closed.

(d) *Types of records not available.* The FOIA does not require the Commission to:

- (1) Compile or create records solely for the purpose of satisfying a request for records;
- (2) Provide records not yet in existence, even if such records may be expected to come into existence at some future time; or
- (3) Restore records destroyed or otherwise disposed of, except that the FOIA Officer must notify the requester that the requested records have been destroyed or disposed.

### **§ 517.5 Responsibility for responding to requests.**

(a) *In general.* In determining which records are responsive to a request, the Commission ordinarily will include only records in its possession as of the date it begins its search for records. If any other date is used, the FOIA Officer shall inform the requester of that date.

(b) *Authority to grant or deny requests.* The FOIA Officer shall make initial determinations either to grant or deny in whole or in part a request for records.

(c) *Consultations and referrals.*

(1) When a requested record has been created by another Federal Government agency that record shall be referred to the originating agency for direct response to the requester. The requester shall be informed of the referral. As this is not a denial of a FOIA request, no appeal rights accrue to the requester.

(2) When a requested record is identified as containing information originating with another Federal Government agency, the record shall be referred to the originating agency for review and recommendation on disclosure.

### **§ 517.6 Timing of responses to requests.**

(a) *In general.* The FOIA Officer ordinarily shall respond to requests according to their order of receipt.

(b) *Multitrack processing.*

(1) The FOIA Officer may use multi-track processing in responding to requests. Multi-track processing means placing simple requests requiring rather limited review in one processing track and placing more voluminous and complex requests in one or more other tracks. Request in either track are processed on a first-in/first-out basis.

(2) The FOIA Officer may provide requesters in its slower track(s) with an opportunity to limit the scope of their requests in order to qualify for faster processing within the specified limits of faster track(s). The FOIA Officer will do so either by contacting the requester by letter or telephone, whichever is more efficient in each case.

(c) *Initial determinations.*

(1) The FOIA Officer shall make an initial determination regarding access to the requested information and notify the requester within twenty (20) working days after receipt of the request. This 20 day period may be extended if unusual circumstances arise. If an extension is necessary, the FOIA Officer shall promptly notify the requester of the extension, briefly stating the reasons for the extension, and estimating when the FOIA Officer will respond. Unusual circumstances warranting extension are:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request;

(ii) The need to search for, collect, and appropriately examine a voluminous amount of records which are demanded in a single request; or

(iii) The need for consultation with another agency having a substantial interest in the determination of the request, which consultation shall be conducted with all practicable speed.

(2) If the FOIA Officer decides that an initial determination cannot be reached within the time limits specified in paragraph (c)(1) of this section, the FOIA Officer shall notify the requester of the reasons for the delay and include an estimate of when a determination will be made. The requester will then have the opportunity to modify the request or arrange for an alternative time frame for completion of the request.

(3) If the FOIA Officer has a reasonable basis to conclude that a requester or group of requesters has divided a request into a series of requests on a single subject or related subjects to avoid fees, the requests may be aggregated and fees charged accordingly. Multiple requests involving unrelated matters will not be aggregated.

(4) If no initial determination has been made at the end of the 20 day period provided for in paragraph (a)(1) of this section, including any extension, the requester may appeal the action to the FOIA Appeals Officer.

(5) If the FOIA Officer determines that another agency is responsible for the records, the FOIA Officer shall refer such records to the appropriate agency for direct response to the requester. The FOIA Officer shall inform the requester of the referral and of the name and address of the agency or agencies to which the request has been referred.

(d) *Granting of requests.* When the FOIA Officer determines that the requested records shall be made available, the FOIA Officer shall notify the requester in writing and provide copies of the requested records in whole or in part once any fees charged under Sec. 517.9 have been paid in full. Records disclosed in part shall be marked or annotated to show the exemption applied to the withheld information and the amount of information withheld unless to do so would harm the interest protected by an applicable exemption. If a requested record contains exempted material along with nonexempt material, all reasonable segregable material shall be disclosed.

(e) *Denial of requests.* When the FOIA Officer determines that access to requested records should be denied, the FOIA Officer shall notify the requester of the denial, the grounds for the denial, and the procedures for appeal of the denial.

(f) *Expedited processing of request.* The FOIA Officer must determine whether to grant the request for expedited processing within (10) calendar days of its receipt. Requests will receive expedited processing if one of the following compelling needs is met:

(1) The requester can establish that failure to receive the records quickly could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(2) The requester is primarily engaged in disseminating information and can demonstrate that an urgency to inform the public concerning actual or alleged Federal Government activity exists.

#### **§ 517.7 Confidential commercial information.**

(a) *Notice to submitters.* The FOIA Officer shall, to the extent permitted by law, provide a submitter who provides confidential commercial information to the FOIA Officer, with prompt notice of a FOIA request or administrative appeal encompassing the confidential commercial information if the Commission may be required to disclose the information under the FOIA. Such notice shall either describe the exact nature of the information requested or provide copies of the records or portions thereof containing the confidential commercial information. The FOIA Officer shall also notify the requester that notice and an opportunity to object has been given to the submitter.

(b) *Where notice is required.* Notice shall be given to a submitter when:

(1) The information has been designated by the submitter as confidential commercial information

protected from disclosure. Submitters of confidential commercial information shall use good faith efforts to designate, either at the time of submission or a reasonable time thereafter, those portions of their submissions they deem protected from disclosure under Exemption 4 of the FOIA because disclosure could reasonably be expected to cause substantial competitive harm. Such designation shall be deemed to have expired ten years after the date of submission, unless the requester provides reasonable justification for a designation period of greater duration; or

(2) The FOIA Officer has reason to believe that the information may be protected from disclosure under Exemption 4 of the FOIA.

(c) *Opportunity to object to disclosure.* The FOIA Officer shall afford a submitter a reasonable period of time to provide the FOIA Officer with a detailed written statement of any objection to disclosure. The statement shall specify all grounds for withholding any of the information under any exemption of the FOIA, and if Exemption 4 applies, shall demonstrate the reasons the submitter believes the information to be confidential commercial information that is exempt from disclosure. Whenever possible, the submitter's claim of confidentiality shall be supported by a statement or certification by an officer or authorized representative of the submitter. In the event a submitter fails to respond to the notice in the time specified, the submitter will be considered to have no objection to the disclosure of the information. Information provided by the submitter that is received after the disclosure decision has been made will not be considered. Information provided by a submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA.

(d) *Notice of intent to disclose.* The FOIA Officer shall carefully consider a submitter's objections and specific grounds for nondisclosure prior to determining whether to disclose the information requested. Whenever the FOIA Officer determines that disclosure is appropriate, the FOIA Officer shall, within a reasonable number of days prior to disclosure, provide the submitter with written notice of the intent to disclose which shall include a statement of the reasons for which the submitter's objections were overruled, a description of the information to be disclosed, and a specific disclosure date. The FOIA Officer shall also notify the requester that the requested records will be made available.

(e) *Notice of lawsuit.* If the requester files a lawsuit seeking to compel disclosure of confidential commercial information, the FOIA Officer shall promptly notify the submitter of this action. If a submitter files a lawsuit seeking to prevent disclosure of confidential commercial information, the FOIA Officer shall notify the requester.

(f) *Exceptions to the notice requirements under this section.* The notice requirements under paragraphs (a) and (b) of this section shall not apply if:

(1) The FOIA Officer determines that the information should not be disclosed pursuant to Exemption 4 and/or any other exemption of the FOIA;

(2) The information lawfully has been published or officially made available to the public;

(3) Disclosure of the information is required by law (other than the FOIA);

(4) The information requested is not designated by the submitter as exempt from disclosure in accordance with this part, when the submitter had the opportunity to do so at the time of submission of the information or within a reasonable time thereafter, unless the agency has substantial reason to believe that disclosure of the information would result in competitive harm; or

(5) The designation made by the submitter in accordance with this part appears obviously frivolous. When the FOIA Officer determines that a submitter was frivolous in designating

information as confidential, the FOIA Officer must provide the submitter with written notice of any final administrative disclosure determination within a reasonable number of days prior to the specified disclosure date, but no opportunity to object to disclosure will be offered.

#### **§ 517.8 Appeals.**

(a) *Right of appeal.* The requester has the right to appeal to the FOIA Appeals Officer any adverse determination.

(b) *Notice of appeal.*

(1) *Time for appeal.* An appeal must be received no later than thirty (30) working days after notification of denial of access or after the time limit for response by the FOIA Officer has expired. Prior to submitting an appeal any outstanding fees associated with FOIA requests must be paid in full.

(2) *Form of appeal.* An appeal shall be initiated by filing a written notice of appeal. The notice shall be accompanied by copies of the original request and initial denial. To expedite the appellate process and give the requester an opportunity to present his/ her arguments, the notice should contain a brief statement of the reasons why the requester believes the initial denial to have been in error. The appeal shall be addressed to the National Indian Gaming Commission, Attn: FOIA Appeals Officer, 1441 L Street, NW., Suite 9100, Washington, DC 20005.

(c) *Final agency determinations.* The FOIA Appeals Officer shall issue a final written determination, stating the basis for its decision, within twenty (20) working days after receipt of a notice of appeal. If the determination is to provide access to the requested records, the FOIA Officer shall make those records immediately available to the requester. If the determination upholds the denial of access to the requested records, the FOIA Appeals Officer shall notify the requester of the determination and his/her right to obtain judicial review in the appropriate Federal district court.

#### **§ 517.9 Fees.**

(a) *In general.* Fees pursuant to the FOIA shall be assessed according to the schedule contained in paragraph (b) of this section for services rendered by the Commission in response to requests for records under this part. All fees shall be charged to the requester, except where the charging of fees is limited under paragraph (d) of this section or where a waiver or reduction of fees is granted under paragraph (c) of this section. Payment of fees should be by check or money order made payable to the Treasury of the United States.

(b) *Charges for responding to FOIA requests.* The following fees shall be assessed in responding to requests for records submitted under this part, unless a waiver or reduction of fees has been granted pursuant to paragraph (c) of this section:

(1) *Copies.* The FOIA Officer shall charge \$0.15 per page for copies of documents up to 8<sup>1</sup>/<sub>2</sub> x 14. For copies prepared by computer, the FOIA Officer will charge actual costs of production of the computer printouts, including operator time. For other methods of reproduction, the FOIA Officer shall charge the actual costs of producing the documents.

(2) *Searches.*

(i) *Manual searches.* Whenever feasible, the FOIA Officer will charge at the salary rate (basic pay plus a percent for benefits) of the employee or employees performing the search. However, where a homogenous class of personnel is used exclusively in a search (e.g. all administrative/clerical or all professional/executive), the FOIA Officer shall charge \$4.45 per quarter hour for clerical time and \$7.75 per quarter hour for professional time. Charges for search

time less than a full hour will be in increments of quarter hours.

(ii) *Computer searches.* The FOIA Officer will charge the actual direct costs of conducting computer searches. These direct costs shall include the cost of operating the central processing unit for that portion of operating time that is directly attributable to searching for requested records, as well as the costs of operator/programmer salary apportionable to the search. The Commission is not required to alter or develop programming to conduct searches.

(3) *Review fees.* Review fees shall be assessed only with respect to those requesters who seek records for a commercial use under paragraph (d)(1) of this section. Review fees shall be assessed at the same rates as those listed under paragraph (b)(2)(i) of this section. Review fees shall be assessed only for the initial record review, for example, review undertaken when the FOIA Officer analyzes the applicability of a particular exemption to a particular record or portion thereof at the initial request level. No charge shall be assessed at the administrative appeal level of an exemption already applied.

(c) *Statutory waiver.* Documents shall be furnished without charge or at a charge below that listed in paragraph (b) of this section where it is determined, based upon information provided by a requester or otherwise made known to the FOIA Officer, that disclosure of the requested information is in the public interest. Disclosure is in the public interest if it is likely to contribute significantly to public understanding of government operations and is not primarily for commercial purposes. Requests for a waiver or reduction of fees shall be considered on a case by case basis. In order to determine whether the fee waiver requirement is met, the FOIA Officer shall consider the following six factors:

(1) The subject of the request. Whether the subject of the requested records concerns the operations or activities of the government;

(2) The informative value of the information to be disclosed. Whether the disclosure is likely to contribute to an understanding of government operations or activities;

(3) The contribution to an understanding of the subject by the general public likely to result from disclosure. Whether disclosure of the requested information will contribute to public understanding;

(4) The significance of the contribution to public understanding. Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities;

(5) The existence and magnitude of commercial interest. Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(6) The primary interest in disclosure. Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(d) *Types of requesters.* There are four categories of FOIA requesters: Commercial use requesters, educational and non-commercial scientific institutional requesters; representative of the news media; and all other requesters. These terms are defined in Sec. 517.3. The following specific levels of fees are prescribed for each of these categories:

(1) *Commercial use requesters.* The FOIA Officer shall charge commercial use requesters the full direct costs of searching for, reviewing, and duplicating requested records.

(2) *Educational and non-commercial scientific institution requesters.* The FOIA Officer shall charge educational and non-commercial scientific institution requesters for document duplication only, except that the first 100 pages of copies shall be provided without



charge.

(3) *News media requesters.* The FOIA Officer shall charge news media requesters for document duplication costs only, except that the first 100 pages of paper copies shall be provided without charge.

(4) *All other requesters.* The FOIA Officer shall charge requesters who do not fall into any of the categories in paragraphs (d)(1) through (3) of this section fees which recover the full reasonable direct costs incurred for searching for and reproducing records if that total costs exceeds \$15.00, except that the first 100 pages and the first two hours of manual search time shall not be charged. To apply this term to computer searches, the FOIA Officer shall determine the total hourly cost of operating the central processing unit and the operator's salary (plus 16 percent for benefits). When the cost of the search equals the equivalent dollar amount of two hours of the salary of the person performing the search, the FOIA Officer will begin assessing charges for the computer search.

(e) *Charges for unsuccessful searches.* Ordinarily, no charges will be assessed when requested records are not found or when records located are withheld as exempt. However, if the requester has been notified of the estimated cost of the search time and has been advised specifically that the requested records may not exist or may be withheld as exempt, fees may be charged.

(f) *Charges for interest.* The FOIA Officer may assess interest charges on an unpaid bill, accrued under previous FOIA request(s), starting the 31st day following the day on which the bill was sent to you. A fee received by the FOIA Officer, even if not processed, will result in a stay of the accrual of interest. The Commission shall follow the provisions of the Debt Collection Act of 1982, as amended, and the implementing procedures to recover any indebtedness owed to the Commission.

(g) *Aggregating requests.* The requester or a group of requesters may not submit multiple requests at the same time, each seeking portions of a document or documents solely in order to avoid payment of fees. When the FOIA Officer reasonably believes that a requester is attempting to divide a request into a series of requests to evade an assessment of fees, the FOIA Officer may aggregate such request and charge accordingly.

(h) *Advance payment of fees.* Fees may be paid upon provision of the requested records, except that payment may be required prior to that time if the requester has previously failed to pay fees or if the FOIA Officer determines the total fee will exceed \$250.00. When payment is required in advance of the processing of a request, the time limits prescribed in § 517.6 shall not be deemed to begin until the FOIA Officer has received payment of the assessed fee.

(i) *Payment of fees.* Where it is anticipated that the cost of providing the requested record will exceed \$25.00 after the free duplication and search time has been calculated, and the requester has not indicated in advance a willingness to pay a fee greater than \$25.00, the FOIA Officer shall promptly notify the requester of the amount of the anticipated fee or a portion thereof, which can readily be estimated. The notification shall offer the requester an opportunity to confer with agency representatives for the purpose of reformulating the request so as to meet the requester's needs at a reduced cost.